expressly provided that the husband's ability should accompany his failure or neglect to provide. "Ability" in statutes authorizing a divorce when the husband refuses or neglects to provide for his wife has been construed by some courts to mean the possession of property which can be applied to that purpose. Thus the divorce was denied where the husband was imprisoned, *Hammond* v. *Hammond*, 15 R.I. 40, 23 Atl. 143 (1885); where husband had only daily earnings to support himself and wife, *Stewart* v. *Stewart*, 155 Mich. 421, 119 N.W. 444 (1909), where husband did not have requisite amount of money or property even though he was shiftless and lazy, *Farnsworth* v. *Farnsworth*, 58 Vt. 555, 5 Atl. 401 (1886); *Berry* v. *Berry*, 18 O.N.P. (N.S.) 521 (1915).

It is generally held that the word "gross" is not redundant, that it means something more than mere neglect. "Gross" means some circumstances of aggravation, or wilfulness, 14 O. Jur. p. 394, indignity or aggravation or insult. *In re Gross Neglect*, 8 Ohio Dec. 701 (1897). Examples of such circumstances are: insulting language, *Holland* v. *Holland*, 8 Ohio Dec. (Reprint) 460 (1892), or excessive drinking, *Zeigler* v. *Zeigler*, 7 Ohio Dec. (Reprint) 139 (1876) or gambling away the family income, *Holland* v. *Holland*, *supra*, or refusal of wife to cohabit for an unreasonable length of time and failure to perform household duties, *Leach* v. *Leach*, 46 Kan. 724 (1891), or, after getting his property, driving her husband from the house and preferring against him a false charge of insanity, *Osterhout* v. *Osterhout*, 30 Kan. 746 (1883). But in *Dunbar* v. *Dunbar*, 4 Ohio Dec. (Reprint) 237 (1878) a gross neglect of duty was not established where the wife ordered her husband to leave the house and finally abandoned him after getting his property.

As the court in the principal case observed, gross neglect of duty is elusive of definition. There is little doubt, however, that the sound discretion of the court, which is the ultimate test, is based on social policies and the special facts of each case.

R. Harold Thomas.

Modification of Divorce Decree Based on Agreement —Provision for Alimony and Support of Child.

A decree for divorce embodied an agreement between husband and wife for the provision of alimony and the support of the child. Subsequently, due to a change of conditions, the husband applied to the court to decrease the amount of the weekly payments. *Held*, because of the

contract between the parties, the decree could not be decreased although an increase was permissible. Original decrees without such contracts between spouses can be decreased or increased. *Ferger* v. *Ferger*, 46 Ohio App. 558, 189 N.E. 665 (1934). The court refused as an authority for a decrease the case of *Corbett* v. *Corbett*, 123 O.S. 543, 196 N.E. 146 (1930), which under identical facts allowed an increase but made no mention of a decrease.

The decisions in Ohio, with the exception of *Connolly* v. *Connolly*, 16 Ohio App. 92 (1922), fail to distinguish between alimony for the wife and for the support of the child and, considering them as one, refuse to allow a decrease in the amount of the decree which was originally set by the agreement of the parties. *Law* v. *Law*, 64 O.S. 369, 60 N.E. 560 (1901); *Clough* v. *Long*, 8 Ohio App. 480 (1918); *Kettenring* v. *Kettenring*, 29 Ohio App. 62, 163 N.E. 43 (1928); *Sargeant* v. *Sargeant*, 8 O.N.P. 238, 11 O.D. 218 (1901); *Sponsellor* v. *Sponsellor*, 110 O.S. 395, 2 Abs. 375 (1924); *Hausaureck* v. *Markbreidt, Administrator*, 68 O.S. 554 (1903); *Contra, Chapman* v. *Jones*, (1934 Ohio App., never recorded).

To allow such a decrease, it is claimed, would be impairing the obligation of contracts and so unconstitutional; however, an increase, surprisingly enough, is allowed on public policy grounds, despite the fact that the contract of the parties is being altered. *Campbell* v. *Campbell*, 46 Ohio App. 197, 188 N.E. 300 (1933). The dissenting judge in that case clearly pointed out this fallacy in the reasoning of the majority of the court.

In *Connolly* v. *Connolly*, *supra*, the court allowed a decrease in the decree for the support of the child but refused one for the support of the wife. This distinction may be due to the fact that the child became, in a sense, the ward of the court. *Hoffman* v. *Hoffman*, 15 O.S. 427 (1864). To the extent that the decree affects the infant, it may be modified or changed by the court at any time during the child's minority. *Connett* v. *Connett*, 81 Neb. 777, 116 N.W. 658 (1908).

The majority of the courts throughout the United States permit the increase or decrease of alimony for the wife or support of the child whether or not there has been an agreement for the spouses setting the exact amount incorporated in the divorce decree. *Beal* v. *Beal*, 218 Cal. 755, 24 Pac. (2d) 768 (1933); *Soule* v. *Soule*, 4 Cal. App. 87 Pac. 205 (1906); *Troyer* v. *Troyer*, 177 Wash. 88, 30 Pac. (2d) 963 (1934); *Morgan* v. *Morgan*, 211 Ala. 7, 99 So. 185 (1924); *Pryor* v. *Pryor*, 88 Ark. 302, 114 S.W. 700 (1908); *Gloth* v. *Gloth*, 153 S.E. 879, 71 A.L.R. 700 (Va. 1930); *Adams* v. *Adams*, 96

Mont. 489, 31 Pac. (2d) 729 (1934); *contra, Buck* v. *Buck,* 60 Ill. 241 (1871); *Dickey* v. *Dickey,* 154 Md. 675, 141 A. 387 (1928); *Parker* v. *Parker,* 55 Cal. App. 458, 203 Pac. 420 (1921). Though the stipulations of the parties to alimony are usually adopted, the court is not bound by them. *Warren* v. *Warren,* 116 Minn. 458, 133 N.W. 1009 (1902). The contract is merely an advisory instrument for the court, depending on the court's approval for its legal efficacy and effect. *Hayes* v. *Hayes,* 75 S.W. (2d) 614 (Mo., 1934). Neither the parents nor the court itself can deprive the court of its continuing jurisdiction over the welfare and maintenance of minor children in divorce action. *Barrett* v. *Barrett,* 39 Pac. (2d) 621 (Ariz., 1934). Considering the social significance of these cases, the result is much to be preferred to that based upon the impairment of the obligation of contact argument.

The recent case of *Newkirk* v. *Newkirk,* 129 O.S. 543, 196 N.E. 146 (1935), without opinion, permitted a deduction in the divorce decree and relied on *Corbett* v. *Corbett, supra,* as their authority. However, there was a conflict as to the existence of a contract between the parties. In *Higbee* v. *Higbee,* another case decided without opinion on October 23, 1935, the Supreme Court refused a motion to certify the record of the lower courts. The Common Pleas and Court of Appeals had held that the court had no jurisdiction to permit a decrease in the obligation of the parties to the contract except upon showing duress or fraud. Did the *Newkirk* case change the Ohio existing law? The Ohio Supreme Court by failing to write an opinion in the last two cases has missed an opportunity to lay down a definite rule on the subject in the State of Ohio. Perhaps, from *Newkirk* v. *Newkirk, supra,* we may infer that Ohio will tend to follow the recent trend of decisions of the other states, i.e., a divorce decree that has embodied a contract of the spouses for alimony for the wife and support of the child can be decreased or increased if the necessary circumstances are found for either.

HARRY A. GOLDMAN.

INTEREST

GRANTED BECAUSE OF UNREASONABLE DELAY IN PAYMENT TO CREDITOR OF DECEDENT.

One Haskenkamp died Dec. 20, 1925. J. M. Murray, having a claim for funeral services and expenses, presented the will for probate on two different occasions, both times in the court of the wrong county. The will was finally sent to Hamilton County, where the decedent had lived, and was admitted to probate. The administrator had tendered the